

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
EBC I, INC. f/k/a ETOYS, INC.)	Case No. 01-0706 (MFW)
)	
Reorganized Debtor.)	
)	
<hr/> EBC I, INC., f/k/a ETOYS, INC.,)	
)	
Plaintiff,)	Adversary Proc. No. 03-50003 (MFW)
)	
v.)	
)	
AMERICA ONLINE, INC.,)	
)	
Defendant.)	

**STATEMENT OF ISSUES AND DESIGNATION OF ITEMS
TO BE INCLUDED IN RECORD ON APPEAL BY APPELLANT**

Appellant, EBC I, Inc., f/k/a eToys, Inc. ("Appellant" or "EBC I"), by its undersigned attorneys, hereby submits, pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure and Rule 8006-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, its statement of issues to be presented on appeal and the items to be included in the record on appeal of (1) the Findings of Fact and Conclusions of Law (Adv.. D.I. 111) (the "FOF/COL"), (2) the Opinion Granting Judgment in Favor of America Online, Inc. (Adv. D.I. 112) (the "January 10, 2008 Opinion"), and (3) the Order Granting Judgment in Favor of America Online, Inc. (Adv. D.I. 113), each entered by the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") in the above-captioned adversary proceeding on January 10, 2008.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Bankruptcy Court erred in concluding that Appellant was entitled to no recovery under 11 U.S.C. § 550 for any fraudulent transfer avoidable under 11 U.S.C. § 548.
2. Whether the Bankruptcy Court erred in concluding that Appellant was entitled to no recovery for any fraudulent transfer avoidable under Virginia law.
3. Whether the Bankruptcy Court erred in concluding that the fully paid up contract rights of eToys, Inc. (“eToys”) under the Interactive Marketing Agreement between America Online, Inc. and eToys Inc., dated August 10, 1999, as amended by the Amendment, dated November 15, 2000 (collectively, the “Agreement”), had no value when the transfer occurred.
4. Whether the Bankruptcy Court erred by applying the incorrect legal standard under 11 U.S.C. §§ 548 & 550 to determine the value of the property transferred to America Online, Inc., n/k/a AOL LLC (“AOL” or “Appellee”), when it terminated the Agreement.
5. Whether the Bankruptcy Court erred by failing to consider the totality of circumstances to determine the value of the property transferred to AOL when it terminated the Agreement.
6. Whether the Bankruptcy Court erred by failing to consider whether AOL gave eToys “value” under 11 U.S.C. § 548(a)(2) in exchange for the transfer of eToys’ fully paid up contract rights that occurred upon termination of the Agreement.
7. Whether the Bankruptcy Court erred in applying a forced sale, bankruptcy liquidation value premise to eToys’ fully paid up contract rights under the Agreement, rather than valuing such rights at their fair market value at the time of the transfer.
8. Whether the Bankruptcy Court erred by not valuing eToys’ fully paid up contract rights under the Agreement when AOL terminated the Agreement in a manner that would have recognized eToys’ expectancy interest in connection with the Agreement.
9. Whether the Bankruptcy Court erred by not valuing eToys’ fully paid up contract rights under the Agreement when AOL terminated the Agreement in a manner that would have recognized eToys’ restitutionary interest in connection with the Agreement.
10. Whether the Bankruptcy Court erred in not valuing eToys’ fully paid up contract rights under the Agreement based on the negotiated contract price established by eToys and AOL pursuant to the Agreement.
11. Whether the Bankruptcy Court erred in not valuing eToys’ fully paid up contract rights under the Agreement based on the price AOL was able to obtain for the impressions it otherwise would have had to deliver to eToys under the Agreement when it resold them following its termination of the Agreement.

12. Whether the Bankruptcy Court erred in ignoring uncontradicted evidence in the record that established that the impressions had significant value as reflected in the prices quoted by AOL for impressions at the time of the termination of the Agreement and that AOL had or could have resold the impressions at a price at least as high as what eToys paid for the impressions under the Agreement.

13. Whether the Bankruptcy Court erred in holding that any sale of eToys' rights under the Agreement, had it not been terminated by AOL, would have been subject to the applicable provisions of the Bankruptcy Code because eToys had announced its intention to file bankruptcy immediately prior to AOL's termination of the Agreement.

14. Whether the Bankruptcy Court erred in treating the Agreement as an executory contract, notwithstanding that eToys had previously paid all amounts due to AOL under the Agreement.

15. Whether the Bankruptcy Court erred in holding that the Agreement was not assignable under Virginia law and/or 11 U.S.C. 365(c)(1).

16. Whether the Bankruptcy Court erred in holding that any restrictions on assignability applicable to the Agreement required the conclusion that eToys' fully paid up contract rights under the Agreement had no value.

17. Whether the Bankruptcy Court erred in stating in its FOF/COL that eToys was in material breach of the Agreement as a result of its announcement in February 2001 that it expected to shut down its website and cease operations when AOL relied upon only eToys' insolvency as a basis for terminating the Agreement.

18. Whether the Bankruptcy Court statement in its FOF/COL (COL ¶ 28) that eToys was in material breach of the Agreement as a result of its announcement in February 2001 that it expected to shut down its website and cease operations should be disregarded as irreconcilably in conflict with the Bankruptcy Court's ruling in its January 10, 2008 Opinion (Op. 26-27) declining to reach the issue of whether such actions constituted material breaches of the Agreement.

19. Whether the Bankruptcy Court erred in failing to apply the law of case doctrine to its prior determinations in its Opinion and Order, each dated December 7, 2006 (Adv. D.I. 72 & 73) (together, the "December 7, 2006 Decision"), concerning the methodology for valuing eToys' fully paid up contract rights under the Agreement transferred upon termination of the Agreement.

20. Whether the Bankruptcy Court erred in allowing AOL to re-litigate the value of services it had provided to eToys under the Agreement from its inception through the date of the Amendment, despite AOL having previously conceded the value of such services and the Bankruptcy Court having previously determined the value of such services in the December 7, 2006 Decision.

21. Whether the Bankruptcy Court erred in giving AOL credit for value provided to eToys in the form of "Welcome Screen impressions" and other services for which no value was assigned by the parties in the Agreement.

22. Whether the Bankruptcy Court erred in denying pre-judgment interest to eToys.

**DESIGNATION OF ITEMS TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant hereby designates the following items to be included in the record on appeal:

Pleadings

<u>TAB NO.</u>	<u>DOCKET NO.</u>	<u>DESCRIPTION OF PLEADING/EVIDENCE</u>
1	1	Complaint To Avoid Fraudulent Transfers And Conveyances And To Recover Damages Due To Breach Of Contract And Unjust Enrichment, filed 1/03/03
2	16	Answer of Defendant America Online, Inc., filed 5/19/03
3	24	Order Granting in Part and Denying in Part Defendant America Online, Inc.'s Motion to Dismiss Complaint, filed 10/10/03
4	46	Motion for Partial Summary Judgment, filed 5/14/04
5	47	Opening Brief Of Plaintiff EBC I, Inc. In Support Of Its Motion For Partial Summary Judgment, filed 5/14/04
6	48	Appendix, filed 5/14/04
7	49	Motion For Summary Judgment of Defendant America Online, Inc., filed 5/14/04
8	50	ENTERED IN ERROR, SEE DOCKET 52 Brief in Support of Defendant America Online, Inc.'s Motion for Summary Judgement (related document(s)49) Filed by America Online, Inc. (Attachments: # 1 Exhibit A to Brief# 2 Declaration of Robert A. Hutchins# 3 Expert Report of Robert A. Hutchins# 4 Exhibit A to Declaration of Robert A. Hutchins# 5 Exhibit B to Declaration of Robert A. Hutchins# 6 Exhibit B-1 to Declaration of Robert A. Hutchins# 7 Exhibit to Declaration of Robert A. Hutchins# 8 Exhibit B-3 to Declaration of Robert A. Hutchins# 9 Index B-4 to Declaration of Robert A. Hutchins# 10 Declaration of Carol Banta# 11 Exhibit A to Declaration of Carol Banta (Schoch Depo)# 12 Exhibit 6 to Schoch Depo# 13 Exhibit 8 to Schoch Depo# 14 Exhibit 9 to Schoch Depo# 15 Exhibit 11 to Schoch Depo# 16 Exhibit 13 to Schoch Depo# 17 Exhibit 17

		to Schoch Depo# 18 Exhibit 21 to Schoch Depo# 19 Exhibit 22 to Schoch Depo# 20 Exhibit 23 to Schoch Depo# 21 Exhibit 24-1 to Schoch Depo# 22 Exhibit 24-2 to Schoch Depo# 23 Exhibit 24-3 to Schoch Depo# 24 Exhibit 24-4 to Schoch Depo# 25 Exhibit 24-5 to Schoch Depo# 26 Exhibit 25 to Schoch Depo# 27 Exhibit 26 to Schoch Depo) (Phillips, Marc) Modified on 5/20/2004 (MEB,). (Entered: 05/14/2004)
9	51	ENTERED IN ERROR, SEE DOCKET 52 Supplemental Brief in Support of Defendant America Online, Inc.'s Motion for Summary Judgement (Exhibit's B, C,D,E,F, G,H,I,J,K,L Related to Docket No. 50) (related document(s)49) Filed by America Online, Inc. (Attachments: # 1 Exhibit 2 to Lenk Depo# 2 Exhibit 4 to Lenk Depo# 3 Exhibit 10 to Lenk Depo# 4 Exhibit 11 to Lenk Depo# 5 Exhibit 12 to Lenk Depo# 6 Exhibit 13 to Lenk Depo# 7 Exhibit 15 to Lenk Depo# 8 Exhibit C to Declaration of Carol Banta# 9 Exhibit D to Declaration of Carol Banta# 10 Exhibit E to Declaration of Carol Banta# 11 Exhibit F to Declaration of Carol Banta# 12 Exhibit G to Declaration of Carol Banta# 13 Exhibit H to Declaration of Carol Banta# 14 Exhibit I to Declaration of Carol Banta# 15 Exhibit J to Declaration of Carol Banta# 16 Exhibit K to Declaration of Carol Banta# 17 Exhibit L to Declaration of Carol Banta# 18 Certificate of Service) (Phillips, Marc) Modified on 5/20/2004 (MEB,). (Entered: 05/14/2004)
10	53	Corrected Brief Related to Docket No. 50 (PLEASE BACK DATE TO MAY 14, 2004), filed 5/18/04
11	54	Continued Corrected Brief Related to Docket No. 50 (PLEASE BACK DATE TO MAY 14, 2004), filed 5/18/04
12	55	Continued Corrected Brief Related to Docket Number 50 (PLEASE BACK DATE TO MAY 14, 2004), filed 5/18/04
13	56	Corrected Supplemental Brief Related to Docket Number 51 (Starting with Exhibit B to Declaration of Carol Banta (Lenk Depo) through Exhibit 15 to Lenk Depo) (PLEASE BACK DATE TO MAY 14, 2004), filed 5/18/04
14	57	Continued Corrected Supplemental Brief Related to Docket Number 51 (Starting with Exhibit C to Declaration of Carol Banta through Certificate of Service) (PLEASE BACK DATE TO MAY 14, 2004), filed 5/18/04
15	59	Answering Brief of EBC I, Inc. in Opposition to AOL's Motion For Summary Judgment, filed 5/28/04
16	60	Appendix, filed 5/28/04
17	61	Brief in Opposition to Plaintiff EBC 1, Inc.'s Motion for Partial Summary Judgment Related to Docket Nos. 46 and 47, filed 5/28/04
18	63	Reply Brief in Support of Defendant America Online, Inc.'s Motion for Summary Judgment, filed 6/11/04

19	64	BRIEF OF PLAINTIFF EBC I, INC. IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT, filed 6/11/04
20	65	Notice of Completion of Briefing related to D.I. 46, 47, 48, 61 and 64, filed 6/15/04
21	66	Notice of Completion of Briefing, filed 6/15/04
22	71	Statement Of Plaintiffs EBC I, Inc. f/k/a Etoys, Inc., Concerning Subsequent Authority Relating To Pending Cross-Motions For Summary Judgment, filed 4/13/06
23	72	Opinion Granting in Part Debtor's Motion for Partial Summary Judgment and Granting in Part Motion for Summary Judgment, filed 12/07/06
24	73	Order Granting in Part Debtor's Motion for Partial Summary Judgment and Granting in Part Motion for Summary Judgment, filed 12/07/06
25	74	Notice of Service Re: Opinion and Order, filed 12/11/06
26	75	Notice of Appeal, filed 12/18/06
27	76	Receipt of filing fee for Notice of Appeal, filed 12/18/06
28	77	Motion for Leave to Appeal, 12/18/06
29	78	Amended Certificate of Service Regarding Notice of Appeal, 12/18/06
30	80	Ex Parte Unopposed Motion Of Plaintiff EBC I, Inc., f/k/a Etoys, Inc., For Extension Of Time To Answer The Motion Of America Online, Inc., n/k/a AOL LLC, For Leave To Appeal, filed 12/20/06
31	82	Order Granting Motion of Plaintiff EBC I, Inc. f/k/a Etoys, Inc. for Extension of Time to Answer the Motion of America Online, Inc. n/k/a AOL, LLC for Leave to Appeal, filed 12/27/06
32	83	Memorandum of Law Of EBC I, Inc. In Opposition To The Motion For Leave To Appeal Of America Online, Inc., filed 1/05/07
33	84	Notice of Completion of Briefing, filed 1/12/07
34	85	Motion To Set A Trial, filed 2/14/07
35	86	Proposed Pretrial Order RE: Motion to Set a Trial Date, filed 2/15/07
36	87	Objection to EBC I Inc.'s Motion to Set Trial, filed 2/28/07
37	88	Notice of Completion of Briefing and Request for Oral Argument re Motion to Set a Trial, filed 3/05/07
38	89	Order Approving Motion to Set a Trial Date, filed 3/20/07
39	91	Proposed Pretrial Order RE: Pretrial Stipulation and Order, filed 5/30/07
40	96	Notice of Agenda of Matters Scheduled for Hearing, 6/22/07
41	98	Certification of Counsel Filed by EBC I, Inc., f/k/a eToys, Inc.. re: Exhibit A, Amended Pretrial Stipulation and Order), filed 06/25/2007

42	100	Transcript of Trial held on June 26, 2007 before the Honorable Mary F. Walrath, filed 7/03/2007)
43	101	Findings of Fact and Conclusions of Law Submitted by Defendant AOL LLC, filed 7/17/07
44	102	EBC I, Inc.'s Proposed Findings of Fact and Conclusions of Law, filed 7/17/07
45	103	Post-Trial Brief of Plaintiff EBC I, Inc., filed 7/31/07
46	104	Post-Trial Brief of Defendant AOL LLC, filed 7/31/07
47	105	Appendix, filed 7/31/07
48	106	Motion for Leave to File Supplemental Appendix to Post-Trial Brief of Defendant AOL LLC, filed 8/02/07
49	107	Response to Motion for Leave to File Supplemental Appendix to Post-Trial Brief of Defendant AOL, LLC, filed 8/03/07
50	108	Notice of Completion of Briefing, filed 8/09/07
51	109	Order Granting Motion for Leave to File Reply, filed 8/15/07
52	111	Findings of Fact and Conclusions of Law, filed 1/10/08
53	112	Opinion Granting judgment in favor of America Online, Inc., filed 1/10/08
54	113	Order Granting judgment in favor of America Online, Inc., filed 1/10/08
55	114	Notice of Service, filed 1/14/08
56	115	Notice of Appeal, filed 1/22/08

Appellant's Exhibits Offered At Trial

<u>TRIAL EXHIBIT NO.</u>	<u>DATE OF EXHIBIT</u>	<u>DESCRIPTION OF PLEADING/EVIDENCE</u>
1		The Interactive Marketing Agreement (PX 1)
2	8/12/99	eToys Deal Summary dated 8/12/99 (PX 5)
3		The Amended Agreement (PX 15)
4		Summary of impressions delivered (PX 20)
5		Summary of impressions delivered (PX 21)
6		Summary of impressions delivered (PX 22)
7		Performance Summary of December 2000 (PX 19)
8	4/26/04	Letter of April 26, 2004 from Gregory S. Chernak to Richard D. Allen

TRIAL EXHIBIT NO.	DATE OF EXHIBIT	<u>DESCRIPTION OF PLEADING/EVIDENCE</u>
9		Responses And Objections Of Defendant America Online Inc. To Plaintiff's First Set of Interrogatories To Defendant
10		Responses And Objections of Defendant America Online Inc. To Plaintiff's Second Set Of Interrogatories Directed To Defendants (including documents attached thereto)
11	9/30/00	September 30, 2000 Form 10-Q (Schoch Ex. 23)
12	11/15/00	November 15, 2000 Form 8-K
13	12/31/00	December 31, 2000 Form 10-Q (Schoch Ex. 26)
14	12/15/00	December 15, 2000 Form 8-K (Schoch Ex. 17)
15		Notice of Termination of Agreement from AOL (Schoch Ex. 13)
16	2/26/01	February 26, 2001 Board of Directors Meeting Minutes (Lenk Ex. 22)
17	11/21/00	E-mail of 11/21/00 from Baig to Wendy (PX 48)
18		AOL Account Services Partner Restructuring Form (PX 30)
19		Summary of Negotiations with eToys (PX 9)
20	8/9/00	E-mail of 8/9/00 from Iannuccilli to Rigdon and Baig (PX 34)
21		Collection of e-mails and charts (PX 6)
22		E-mails (PX 27)
23	9/7/00	Text mail summary dated September 7, 2000 (PX 37)
24		Draft of the Amended Agreement (PX 45)
25		Draft of the Amended Agreement (PX 46)
26		Draft of the Amended Agreement (PX 47)


Selected Appellee's Exhibits Offered At Trial

<u>TRIAL EXHIBIT NO.</u>	<u>DATE OF EXHIBIT</u>	<u>DESCRIPTION OF PLEADING/EVIDENCE</u>
66		Disclosure Statement To Accompany Consolidated First Amended Liquidating Plan of Reorganization of EBC I, Inc. (Bankr. D.I. 1141)
67		Renewed Motion Of Debtors And Debtors-In-Possession For Orders Under 11 U.S.C. §§ 105(A), 363(B), (F), And (M), 365, And 1146(C), And Fed. R. Bankr. P. 2002, 6004, 6006, 9014 And 9019 (A) Authorizing And Approving (I) Sale Of Substantially All Of Debtors' Assets Free And Clear Of Liens, Claims And Encumbrances, (II) Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases, (III) The Compromise Of Certain Disputes With Respect To Assets To Be Conveyed, (IV) Certain Bid Protections, And (B) Granting Related Relief (Bankr. D.I. 274)
68		Reply Of Debtors and Debtors In Possession In Support Of Renewed Motion Of Debtors And Debtors-In-Possession For Orders Under 11 U.S.C. §§ 105(a), 363(b), (f), And (m), 365, And 1146(c), And Fed. R. Bankr. P. 2002, 6004, 6006, 9014 And 9019 (a) Authorizing And Approving (i) Sale Of Substantially All Of Debtors' Assets Free And Clear Of Liens, Claims And Encumbrances, (ii) Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases, (iii) The Compromise Of Certain Disputes With Respect To Assets To Be Conveyed, (iv) Certain Bid Protections, And (b) Granting Related Relief (Bankr. D.I. 350)
69		Order (A) Authorizing And Approving (i) Sale Of Substantially All Of Debtors' Assets Free And Clear Of Liens, Claims And Encumbrances, (ii) The Compromise Of Certain Disputes With Respect To Assets To Be Conveyed And (B) Granting Related Relief (Bankr. D.I. 361)

Deposition Designations Offered At Trial

Attached as **Exhibit A** hereto and incorporated herein by reference as part of the appellate record are deposition designations offered to the Bankruptcy Court at trial.

MORRIS NICHOLS ARSHT & TUNNELL LLP



Richard D. Allen (#469)

Gregory W. Werkheiser (#3553)

Thomas W. Briggs, Jr. (#4076)

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P.O. Box 1347

Wilmington, DE 19899-1347

Attorneys for Appellant/Plaintiff
EBC I, Inc., f/k/a eToys, Inc.

February 1, 2008

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EXHIBIT A

[Deposition Designations]

E-TOYS DEPOSITION DESIGNATIONS

MIRZA BAIG

From		To	
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E-TOYS DEPOSITION DESIGNATIONS

PETER BRINE

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E-TOYS DEPOSITION DESIGNATIONS

JANINE BOUSQUETTE

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E-TOYS DEPOSITION DESIGNATIONS

SUE BURGER

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SUE BURGER (cont'd)

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E-TOYS DEPOSITION DESIGNATIONS

CHRISTOPHER IANNUCCILLI

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E-TOYS DEPOSITION DESIGNATIONS

EDWARD LENK

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E-TOYS DEPOSITION DESIGNATIONS

STEVEN SCHOCH

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E-TOYS DEPOSITION DESIGNATIONS

CHRISTOPHER VALLE

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AOL's DEPOSITION DESIGNATIONS**Mirza Baig****FROM****TO**

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Christopher Iannuccilli

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Christopher Valle

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Janine Bousquette

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Peter Brine

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Edward (Toby) Lenk

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Steven Schoch

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E-TOYS COUNTER-DESIGNATIONS OF DEPOSITION TESTIMONY**MIRZA BAIG**

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22	9	23	15
46	5	46	11
52	18	53	2
92	3	92	15
98	1	98	14
132	7	132	13
166	18	166	21

CHRISTOPHER IANNUCILLI

From		To	
Page	Line	Page	Line
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69	15	69	22

CHRISTOPHER VALLE

From		To	
Page	Line	Page	Line
43	10	43	12
59	10	59	20

JANINE BOUSQUETTE

From		To	
Page	Line	Page	Line
None			

PETER BRINE

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Page	Line	Page	Line
35	15	36	3
49	12	49	17

EDWARD (TOBY) LENK

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Page	Line	Page	Line
47	2	47	17
181	18	182	1

STEPHEN SCHOCH

From		To	
Page	Line	Page	Line
40	12	40	24
101	17	101	18
134	23	135	5

861571.1

AOL's DEPOSITION COUNTER-DESIGNATIONS**Mirza Baig****FROM****TO**

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56:10	57:22
58:14	59:7
63:9	64:9
65:11	68:6
71:19	72:13
75:7	75:17
76:22	77:5
77:18	77:21
94:19	95:6
96:18	98:8
102:20	103:3
106:1	106:7
109:10	109:22
116:14	120:22
121:19	123:1
124:17	125:1
156:15	156:22
159:8	159:13
161:22	162:61

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Christopher Iannuccilli

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50:7	50:15
52:12	52:22
59:4	59:16
67:1	67:17
72:12	73:19
76:16	81:4
85:1	85:11
90:16	91:14
93:5	94:2
94:20	95:4
97:3	98:15
100:3	103:21
104:21	105:8
107:6	107:16
110:4	111:1
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Peter Brine

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83:9	83:17
84:12	84:18

Edward (Toby) Lenk

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135:1	136:3
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Steven Schoch

55:11	55:23
113:1	118:5
119:9	119:18
122:17	126:9
128:3	128:17
135:6	136:5
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167:15	168:4
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174:23	175:6
179:17	182:1

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Christopher Valle

7:23	7:25
12:24	13:5
20:21	21:7
25:17	30:8
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44:18	47:17
48:4	49:10
49:20	49:21
54:1	54:5
78:10	81:23
83:15	87:3
91:15	92:10
99:21	101:4
104:15	105:19

Sue Burger

21:3	25:6
31:7	31:17
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70:21	71:9
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74:16	75:13
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78:20	83:21
99:20	100:12
103:12	104:23
105:13	106:11
107:2	108:70
110:8	110:17
115:10	117:18
140:20	140:22
162:4	162:14
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172:5	174:6

CERTIFICATE OF SERVICE

I, Gregory W. Werkheiser, Esquire, certify that I am not less than 18 years of age, and that service of the foregoing Statement Of Issues And Designation Of Items To Be Included In Record On Appeal By Appellant was caused to be made on February 1, 2008, upon the attorneys listed below as follows:

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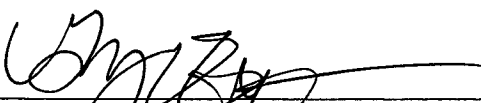
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